No. 80-1205

In the Supreme Court of the United States

OCTOBER TERM, 1980

FORD MOTOR CREDIT COMPANY,
Petitioner,

vs.

JANET CENANCE, et al.,
Respondents.

Motion for Permission to File Brief Amicus Curiae in Support of Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Ciruit and Brief Amicus Curiae

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TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Pursuant to Rule 36.1 of the Rules of the Supreme Court of the United States, the California Bankers Association (hereinafter referred to as "CBA") moves this Court for permission to file a Brief Amicus Curiae in this case in support of the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit filed by Petitioner.

In support of this motion, CBA respectfully alleges as follows:

1. CBA is a trade association, and all banks doing business in California are members of CBA.

2. Banks in California provide wholesale financing to automobile dealers and purchase retail installment sale contracts from automobile dealers covering products sold by them.

3. These retail installment sale contracts are subject to the Truth in Lending Act (15 USC, Section 1601 et seq.) and Regulation Z (12 CFR Section 226).

4. The terms of sale, price, down payment, finance charge, payment and other credit terms of installment sale contracts purchased by banks are negotiated by the automobile dealer with the buyer.

5. As a general rule, banks have no contact with the buyers signing installment sale contracts concerning the contract until after purchasing the contract on an assignment from the dealer who made the sale.

6. The Federal Reserve Bank of San Francisco advises that during April, 1979, banks in the Twelfth Federal Reserve District purchased installment sale contracts for the purchase of automobiles totaling $312,000,000, and held a total of such contracts amounting to $7,465,000,000.

7. In order to purchase automobile installment sale contracts, banks need to know: (a) whether or not they are to be treated as "creditors" or "subsequent assignees," (b) if they are treated as "creditors," how they must be identified on the disclosure statement, (c) who must make disclosures, and (d) if they are to be treated as creditors, what disclosures they must make.

8. There is ambiguity and conflict among the decisions of the various United States Courts of Appeals regarding these issues.

9. CBA is familiar with the factual and legal issues raised in this case, and believes that the decision in this case has added to this ambiguity and conflict.

10. CBA has read the Petition for a Writ of Certiorari filed herein and wishes to add additional argument in support of the Petition concerning the importance of resolving the ambiguity and conflict concerning these issues.

11. CBA has attempted, but has been unable, to obtain the consent required by Rule 36.1 of the Rules of the Supreme Court of the United States.

CBA respectfully requests that this Court grant it permission to file an Amicus Curiae Brief in support of the Petition for a Writ of Certiorari. The Brief, which is submitted with this Motion and has been served upon Petitioners and Respondents, is limited in scope to setting forth the reasons why the Petition should be granted.

Dated: February 11, 1981.

Respectfully submitted,

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I

THE INTEREST OF CBA

The California Bankers Association (hereinafter referred to as "CBA") is a trade association incorporated under the laws of the State of California. Its primary purpose is "to promote, to provide a medium for study and discussion of problems in respect to, and to express opinions on questions affecting, the general welfare of commercial banking and trust company businesses." (Articles of Incorporation)

All banks doing business in California are members of CBA.

Among their activities, banks purchase a very substantial volume of "automobile dealer paper." That is to say, that banks, under varying arrangements with automobile dealers, purchase the installment sale contracts which automobile dealers have entered into with buyers purchasing their products.

While figures showing the exact dollar volume of this financing in California are not readily available, the Federal Reserve Bank of San Francisco advises that during April, 1979, banks in the Twelfth Federal Reserve District purchased automobile sale contracts totalling $312,000,000, and held a total of such contracts amounting to $7,465,000,000. If the average contract was $10,000, it would mean that these banks purchased 31,200 contracts and held a total of 746,500 contracts in April, 1979.

The banks in California are genuinely concerned about complying with the laws and regulations governing their business and investments, and make a conscientious effort to do so. Complying with Regulation Z, 12 CFR § 226, (hereinafter referred to as the "Regulation") is expensive. For example, General Motors Acceptance Corp. has testified before Congress that since the effective date of the Truth in Lending Act, 15 USC, Section 1601 et seq. (hereinafter referred to as the "Act") and the Regulation, the company has spent more than $3,000,000 to accomplish changes to its forms. (Oversight Hearings on the Simplification of the Truth in Lending Act Before the Subcomm. on Consumer Affairs of the House Comm. on Banking, Finance and Urban Affairs, 95th Cong., 2d Sess. 558, 1978). At the same hearings the National Consumer Finance Association testified that one Circuit Court decision engrafting a new requirement onto the Regulation can cost between $3,000,000 and $6,000,000.

The complexity of the Act and the Regulation, with their many judicial and agency interpretations, makes compliance a difficult and expensive burden. When the court decisions are in conflict, compliance becomes an impossible burden.

The Act provides for fines or imprisonment for willful and knowing violations and for civil liability for failure to comply with any requirement of the Act. (Sections 112 and 130). Action may be brought within one year from the date of violation, and civil liability, in the case of individual actions, is fixed at twice the amount of the finance charge in connection with the transaction, with limits of not less than $100 or more than $1,000.

Because the finance charge for an automobile installment sale contract is likely to be at least $500, any civil liability for each of these contracts is likely to be the maximum of $1,000.

If we assume that banks in the Twelfth Federal Reserve District purchased 31,200 contracts in April 1979, as indicated above, and that in April, 1980, they purchased only half as many, i.e. 15,600 contracts, and that each of these contracts is required to and fails to disclose the purchasing bank in the manner required by the Fifth Circuit, the civil penalties, aside from the criminal penalties, on these 15,600 contracts could amount to $15,600,000. Furthermore, if this figure of 15,600 represents a monthly average of the number of installment sale contracts purchased during the past 12 months (within the statute of limitations), and if they contain similar violations, the civil penalties for an annual total of 187,200 contracts could amount to as much as $187,200,000.

In view of these criminal and civil penalties, banks have the right to know what is required. On many occasions this

Court has recognized the public's right to know what is required to comply with the law.

In *Bouie v. City of Columbia,* 378 U.S. 347, 12 L.ed 2d 894, 898 (1964), the Court held:

> ". . . We have recognized in such cases that 'a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.'"

In *Lanzetta v. New Jersey,* 306 U.S. 451, 83 L.ed. 888, 890 (1939), the Court held:

> "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. *All are entitled to be informed as to what the state commands or forbids.*" (Emphasis added).

II

THE ISSUES AND CONFLICTS

These cases (hereinafter referred to as the *"Cenance"* cases) present four Truth-In-Lending issues faced by all banks when they purchase an installment sale contract from a dealer. These issues are:

A. Is the bank a "creditor" or an "assignee" within the meaning of the Act and Regulation?

B. If the bank is a "creditor," must it be identified as "creditor"?

C. Who must make the disclosures?

D. If the bank is a "creditor," what disclosures must it make?

Unlike many Truth-In-Lending cases where the issues deal with what is in a particular contract, these four issues

are present in every contract purchased by banks because they relate to the basic structure of installment sales financing and how disclosures should be made for Truth-In-Lending purposes. Thus, a uniform and logical resolution of these issues is vital and is of importance to the entire industry.

Despite the urgent need for certainty and uniformity in the disclosures that must be made in installment sales financing, the Circuits are hopelessly in conflict on the above issues. The *Cenance* cases sharply present this conflict.

A. Creditor Or Assignee

In the *Cenance* cases the Court held that Ford Motor Credit was not a subsequent assignee.

The Act itself recognizes that the original creditor and a subsequent assignee are separate and different parties, and provides different obligations for them.

Section 131 of the Act provides:

> "Except as provided in section 125(c) and except in the case of actions brought under section 130(d), in any action or proceeding by or against any subsequent assignee of the original creditor without knowledge to the contrary by the assignee when he acquires the obligation, written acknowledgment of receipt by a person to whom a statement is required to be given pursuant to this title shall be conclusive proof of the delivery thereof and, unless the violation is apparent on the face of the statement, of compliance with this chapter. This section does not affect the rights of the obligor in any action against the original creditor."

Financial institutions have relied on this distinction between a creditor and assignee for determining their obligations and in handling installment sale contracts.

The legislative history of the Act and the Truth In Lending Simplification and Reform Act, (Public Law 96-221-

Mar. 31, 1980) dealing with the liability of assignees and Congress's intention that assignees in typical installment sales financing transactions are not to be considered "creditors" within the meaning of the Act, is carefully and pointedly set forth in Appendix D, at page 94 of Petitioners's Petition.

The difference between the roles of a creditor and a third party financing institution has been recognized by the Supreme Court of California. In *Boerner v. Colwell Co.* 145 Cal. Rptr. 380, (1978) the California Supreme Court stated:

> ". . . The question before us, therefore, resolves itself to this: Does the mere participation by a non-exempt financing institution in a transaction such as that before us—no matter how well-intentioned and no matter how fully disclosed to the contracting parties—operate to convert what would otherwise be regarded as a bona fide credit sale (such as, for example, in the case where the builder is able to finance the sale itself without institutional assistance) into a loan subject to the usury laws?
>
> "Under the law of this and the significant majority of other jurisdictions the answer is clearly no." (145 Cal.Rptr. 380, 390)
>
> . . . . .
>
> "The role of the financing institution in transactions of this kind is basically a beneficial one, for the essence of their function is that of providing needed financial assistance to sellers unable to handle their own consumer financing, thus permitting those sellers to compete on a more equal footing with their more established competitors. While regulation of these activities is essential for the protection of the vital interests of the consumer, the Unruh and Rees-Levering Acts provide ample evidence of the Legislature's willingness to provide such regulation; we must assume that the

> lawmakers, in light of the instant opinion, will make haste to treat the narrow, perhaps inadvertently unregulated area with which this case is concerned. (See fn.12, ante.) In any event, it is our view that the instrument of the usury laws has no place in the field of bona fide credit sale financing, and that its use must be limited to those cases in which the record clearly reveals that the substantial intent of the parties was to effect the hire of money at an excessive rate of interest rather than to finance a bona fide sale of property. This is not such a case." (145 Cal. Rptr. 380, 391)

There is a difference between an original creditor and a subsequent assignee, and banks need to know which they are deemed to be in order to determine their obligations.

B. If Bank Is Creditor, Must It Be Identified As "Creditor"

There is a conflict as to whether or not a financial institution must be disclosed as "creditor."

In the *Cenance* cases the contract provided as follows: "The foregoing contract hereby is accepted by the seller and assigned to Ford Motor Credit Company in accordance with the terms of assignment set forth on the reverse side hereof." The Fifth Circuit Court found that: (1) the dealer had a standing agreement with Ford Motor Credit, (2) the dealer and Ford Motor Credit prearranged for the assignment of the contract to Ford Motor Credit, (3) at no time did the risk of finance reside with the dealer, (4) the sale transaction was conditioned upon acceptance of the credit application by Ford Motor Credit, and (5) the credit application form was prepared by Ford Motor Credit. The Fifth Circuit Court held that:

> "Disclosure of Ford as subsequent assignee does not clearly identify it as creditor. Additionally, Ford cannot be both a creditor and a subsequent assignee . . . Accordingly, because Ford is a creditor for Truth-In-

> Lending purposes and did not disclose that status except by reference to assignment, we hold that Ford violated Section 226.6(d) of Regulation Z . . ." (621 F.2d 130, 134)

In *Milhollin v. Ford Motor Co.*, 588 F.2d 753 (9th Cir. 1978), *rev'd on other grounds, Ford Motor Credit Co. v. Milhollin,* 444 U.S. 555 (1980), the contract had the same notice of assignment to Ford Motor Credit as in the *Cenance* cases. The Ninth Circuit Court found that: (1) Ford Motor Credit had a program for purchasing contracts from the dealer, (2) Ford Motor Credit provided forms of credit applications, contracts and rate charts, (3) the contracts were typically assigned to Ford Motor Credit shortly after the sales were consummated, and (4) the dealer may obtain prior approval from Ford Motor Credit for customers with marginal credit ratings. In *Milhollin* the Ninth Circuit Court held that:

> "For our purposes it is unnecessary to decide whether the identification of each creditor is a required disclosure or if Ford Credit is a creditor of Consumers (Plaintiffs). Assuming an affirmative answer to these questions, we conclude that the status of Ford Credit, even if it is a creditor, was adequately disclosed." (588 F.2d 753, 756).

In *Sharp v. Ford Motor Credit Co.*, 615 F.2d 423 (7th Cir. 1980), the contract had the same notice of assignment to Ford Motor Credit as in the *Cenance* and *Milhollin* cases. The Seventh Circuit Court found that: (1) Ford Motor Credit provided financing to dealers by purchasing retail installment contracts, (2) Ford Motor Credit provided dealers with forms of credit applications and installment sales contracts, (3) dealers, pursuant to a standing arrangement, typically assigned executed contracts to Ford

Motor Credit within a few days after the sales were consummated, and (4) dealers may obtain prior approval from Ford Motor Credit for customers with marginal credit ratings. In *Sharp* the Seventh Circuit Court held that:

> "Assuming arguendo that Ford and General (the finance companies) were creditors within the meaning of the Act and Regulation Z, we conclude that their statuses were adequately identified to the appellants on the faces of the installment contracts." (615 F.2d 423, 426)

In *Augusta v. Marshall,* 614 F.2d 1085, (6th Cir. 1979), the contract had the same notice of assignment to Ford Motor Credit as in the *Cenance* and *Milhollin* cases, and the facts were nearly identical. The Court held that:

> "We need not decide whether Ford Credit was, as an assignee, a creditor within the meaning of the Regulation and need not decide whether the payment coupon book gave timely notice, if such was required. We determine that Judge Krupansky was correct in holding that the installment contract itself gave adequate notice of Ford Credit's involvement in the transaction." (614 F.2d 1085, 1086).

Hence, the Fifth Circuit Court is in conflict with the Ninth, Seventh and Sixth Circuit Courts as to how the bank is to be identified.

Further, the *Cenance* cases also conflict with the *Official Staff Interpretation of Regulation Z,* 41 Fed. Reg. 41908 (1976), which provides:

> "Although the identification of a creditor is a required disclosure under Section 226.8(a) (Regulation Z), this disclosure does not constitute required 'terminology.'"

In *Ford Motor Credit Co. v. Milhollin,* 444 U.S. 555, 63 L.ed. 2d 22 (1980) this Court held that the Federal

Reserve Board's official staff interpretations are controlling unless they are demonstrably irrational. As stated by this Court:

> "That statutory provision signals an unmistakable congressional decision to treat administrative rulemaking and interpretation under TILA as authoritative. Moreover, language in the legislative history evinces a decided preference for resolving interpretive issues by uniform administrative decision, rather than piecemeal through litigation." (63 L.ed. 2d 22, 32)

C. Who Must Make Disclosures

There is a conflict as to who must make disclosures.

In the *Cenance* cases the Fifth Circuit Court affirmed the holding of the lower court that Ford Motor Credit was liable for all disclosure violations.

In *Hinkle v. Rock Springs National Bank,* 538 F.2d 295 (10th Cir. 1976), and *Price v. Franklin Investment Co., Inc.,* 574 F.2d 594 (D.C. Cir. 1978) the Tenth and D.C. Circuit Courts held that the financial institution was a creditor in an installment sale transaction and that both the dealer and the financial institution must make disclosures under Section 226.6(d) of the Regulation.

Section 226.6(d) of the Regulation provides:

> "If there is more than one creditor or lessor in a transaction, each creditor or lessor shall be clearly identified and shall be responsible for making only those disclosures required by this Part which are within his knowledge and the purview of his relationship with the customer or lessee. If two or more creditors or lessors make a joint disclosure, each creditor or lessor shall be clearly identified. *The disclosures required under paragraphs (b) and (c) of Section 226.8 shall be made by the seller if he extends or arranges for the extension of credit . . .*" (Emphasis added)

In *Manning v. Princeton Consumer Discount Co., Inc.*, 533 F.2d 102 (3rd Cir. 1976), the Court found that: (1) the dealer had arranged for a loan for the plaintiff to purchase an automobile, (2) the lender (Princeton) made the consumer loan disclosures to the plaintiff required by Section 129 of the Act, and (3) neither the dealer nor Princeton made the "credit sale" disclosures listed in Section 128 of the Act. The Third Circuit Court held that credit sale disclosure should have been made. The Court stated:

> "In short, we hold that if the transaction is one in which the seller arranges credit, the obligation of disclosure is placed upon him by the third sentence of Regulation Section 226.6(d). In that factual situation the specific direction of the third sentence prevails over the general language limiting the scope of disclosure to items within the creditor's knowledge and the purview of his relationship with the customer." (533 F.2d 102, 105).

Hence, the Fifth, Tenth, and D.C. Circuit Courts are in conflict with the Third Circuit Court and the third sentence of Section 226.6(d) of the Regulation.

D. What Disclosures Must a Bank Make

The Regulation provides specific and differing disclosures for credit sales (Section 226.8(c)) and for loans (Section 226.8(d)).

In the *Cenance* cases the contract between the dealer and buyer purported to give the disclosures required in a credit sale transaction. Since the Fifth Circuit held that Ford Motor Credit was a creditor and liable for all disclosure violations, it must be assumed that the Court determined that Ford Motor Credit should have given credit *sale* disclosures.

This would be consistent with the Fifth Circuit Court's decision in *Meyer's v. Clearview Dodge Sales, Inc.*, 539 F.2d

511 (5th Cir. 1976) where the Court held that the dealer and the financial institution are both creditors and are jointly obligated to make Truth-In-Lending *sale* disclosures.

However, in *Joseph v. Norman's Health Club, Inc.*, 532 F.2d 86 (8th Cir. 1976) where the Court found that the finance company must bear full responsibility for all disclosures required under the Act, the Court held that Truth-In-Lending *loan* disclosures were required and said:

> ". . . As we have discussed, the substance of the transactions is the controlling factor. In that light, we find the arrangement a mere pretext for consumer loans which required disclosure under the Act by both the club and the finance companies. Cf. Twin City Fed. Sav. & Loan Association v. Transamerica Ins. Co., 413 F.2d 494 (8th Cir. 1969)." (532 F.2d 86, 93)

Hence, if banks are deemed to be "creditors," there is a conflict as to whether they are to make *sale* or *loan* disclosures to buyers.

Recharacterizing a sale transaction as a loan transaction, or a loan transaction as a sale transaction, may also cause usury and finance charge problems for dealers and banks. In order to determine if a proper finance charge for a sale or a proper interest rate for a loan is being charged, the party making disclosure must know the nature of the transaction being disclosed.

Finally there is the question of what is best for the consumer.

Is the consumer best served if he receives *loan* disclosure information when he thinks he is entering into a *sale* transaction, or receives *sale* disclosure information when he thinks he is entering into a *loan* transaction, or is he confused?

Is the consumer best served when he is given disclosure information by a party he does not know and with whom he has had no dealings, as is the case when he has talked with the dealer only and has had no contact with the financing institution, or is he confused?

Is the consumer best served if he is given both *sale* and *loan* disclosures, or is he confused?

The admonition of this Court in *Ford Motor Credit Co. v. Milhollin,* (supra) is appropriate:

> ". . . The concept of 'meaningful disclosure' that animates TILA . . . cannot be applied in the abstract. *Meaningful* disclosure does not mean *more* disclosure. Rather, it describes a balance between 'competing considerations of complete disclosure . . . and the need to avoid . . . informational overload.' " (63 L.ed. 2d 22, 33)

III

SUMMARY

To summarize:

1. Banks have substantial investments in dealer paper involving many transactions and millions of dollars.

2. Banks need to know what is required of them when purchasing dealer paper.

3. There are conflicting opinions among the Circuit Courts and confusion as to the status and obligations of banks when purchasing dealer paper.

4. Particularly, banks need and should be able to know:

   (A) whether or not they are "creditors" or "assignees,"

   (B) whether or not they are required to be identified as "creditors,"

   (C) who must make disclosures, and

   (D) what, if any, disclosures they must make.

IV

CONCLUSION

The resolution of these matters is important to banks, and CBA respectfully urges this Honorable Court to grant Petitioner's Petition for a Writ of Certiorari in this matter.

Dated: February 11, 1981.

Respectfully submitted:

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